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IN THE

Supreme Court of the United States

October Term, 1995

HERBERT W. DUNMEYER, KERRY T. FURUTA, JULIE ENDER JACKSON, GARY L. JOHNSON, TERRY B. KARCH, DAVID K. KENTALA, BRUCE A. PERRET, ERNEST R. PROCALO, RICHARD A. FORSTER, GARY C. JONES, RAY A. ORAVETZ, ROBERT M. PECKELS, JR., JERE C. WHITE, JAMES D. WILLIAMS, JOSEPH B. ZUCHT, II,

Joint Petitioners

vs.

BECTON, DICKINSON and COMPANY, a foreign corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS REPLY TO BRIEF IN OPPOSITION

James M. Thomas
(Counsel of Record)

Weiss, Jensen, Ellis & Howard
2600 Pike Tower, 520 Pike Street
Seattle, WA 98101
(206) 340-1825

Attorneys for Joint Petitioners
Dunmeyer, Furuta, Jackson, Johnson, Karch, Kentala, Perret, Procalo, Forster, Jones, Oravetz, Peckels, White, Williams, Zucht

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PETITIONERS REPLY TO BRIEF IN OPPOSITION

In common parlance, Becton Dickinson just does not seem to get it. One would assume after having been assessed over $27,000 in terms (CR 211 at 1, 3) in this matter, and now being before the nation's highest court, Becton Dickinson would fairly discuss the issues presented rather than continue its lowest common denominator approach by making statements totally unsupported by the record, and by

attempting to obfuscate rather than convince. Such a strategy, however, cannot mask the flaws in its opposition to the granting of the Writ of Certiorari.

I. No Second Notice of Appeal Required of Litigants Already Before Ninth Circuit

In opposing the granting of the Writ on the second notice of appeal issue, and ignoring (1) the notice actually afforded to Becton Dickinson ("BD"), (2) the "ripening" of the initial June 1994 Notice of Joint Appeal, and (3) the specific request for review of particular trial court orders made in October, 1994 (see Appendix B-9), the point in BD's fundamental form-over-substance position is the October 1994 FRAP 27 Motion to Expand Review was different from a Notice. The fact is, however, that given this Court's pronouncement in Smith v. Barry, 502 U.S. 244, 247-48, 112 S. Ct. 678, 681 (1992), that "notice afforded by [a] document" that sets out the "parties taking the appeal", the particular "order or part thereof appealed from", and names the "court to which the appeal is taken", satisfies FRAP 3 and

4. Whether a party requests the Court of Appeals to review specific trial court orders in a document entitled a "notice", or in a document entitled a "Motion" from parties already before that Court of Appeals, is not material. The critical factor is the "notice afforded" in the document[1], not its title.

Here, BD has not, and cannot contend it was not specifically given notice of precisely the orders petitioners were seeking the Court of Appeals to review. The initial Notice of Joint Appeal (Appendix B-1 - B-4) and the specific, timely request by petitioners that the Ninth Circuit review "include the following orders" listed in its FRAP 27 Motion (Appendix B-9) gave all the notice FRAP 3 and 4 contemplated. Nothing more was required.

[1] See Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614, 618 (9th Cir. 1993)("opening brief satisfied the requirements of Rule 3"); see also Intercargo Ins. Co. v. United States, 83 F.3d 391, 395 (Fed. Cir. 1996) where Federal Circuit endorsed the stance that variations in the "wording of the notice of appeal are generally overlooked if the true intentions of the appellant can fairly be ascertained, if the courts have not been misled, and if the other parties have suffered no prejudice;" Stuart v. United States, 23 F.3d 1483, 1485 (9th Cir. 1994) (Court has "power to permit a party to amend a notice of appeal even without a formal motion").

BD's final aside that, in any event, the "unique and non-recurring" insistence of the Ninth Circuit on a second Notice of Appeal "is not worthy of further review," sidesteps both this Court's desire for consistent application of the FRAP, and the ongoing practical realities of litigation, where every day some trial court orders are final as to some parties[2], though interlocutory as to others.

Joint Petitioners respectfully submit that this Court's taking review of this matter, and making it clear that parties already before a circuit court, who gave notice of orders they wished reviewed, need not file a second notice of appeal as issues ripen, will prevent appeals from degenerating into the Byzantine treatment of appeals advocated by BD. Under such a reading of the FRAP, if left uncorrected, appeals with merit will time and again be left to drown in a mercurial sea

[2] As this Court recognized in Quackenbush v. Allstate Ins. Co., ___ U.S. ___, 116 S.Ct. 1712, 1719 (1996), when a trial court order "puts the litigants ... 'effectively out of court'," they can appeal rulings contrary to them. At a minimum then, the Dunmeyer intervenors, no longer class members, denied intervention individually and "out of court," were free to appeal each of the seven orders they timely requested be reviewed.

of rulings and court rules that purport to mean what they say but do not say what they mean -- a result that in and of itself flies in the face of this Court's support of simplifying the FRAP to make them "more easily understood". See 116 S. Ct. CCXVII.

II. FRCP 23 Cannot Be Nullified by False Conflicts

In opposing this Court's taking review of the issue pertaining to the continued efficacy of FRCP 23, BD appears to contend this Court does not have jurisdiction over that issue, and asserts there is "no federal question" here despite the focus on the practical functioning of FRCP 23. These assertions must be rejected.

First, this Court has jurisdiction to review issues from "[c]ases in the courts of appeal" whether or not they were interlocutory, whether they were ruled on or not, and "before or after rendition of judgment or decree ..." 28 U.S.C. § 1254(1); Nixon v. Fitzgerald, 457 U.S. 731, 742-44, 102 S. Ct. 2690, 2697-98 (1982); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 488 n.6, 88 S. Ct. 2224,

2228-29 n.6 (1968); Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-58, 36 S. Ct. 269, 271 (1960)(Court can "rectify any error that may have occurred in the interlocutory proceedings").

Second, as recognized in this Court, class actions under FRCP 23 create an avenue for "justice to the lowly as well as those liberally endowed with power and wealth". Eisen v. Carlisle & Jacqulin, 417 U.S. 156, 186, 94 S. Ct. 2140, 2156 (1974). Certainly the proper functioning of FRCP 23 and its continued utility in the federal courts on a multi-state basis is every bit as "important" to this Court as the functions of FRCP 26-37. See Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385 (1947). With wrongs perpetrated on citizens residing in various states[3] an unfortunate yet

[3] Such multi-state wrongs, recognized as a matter of law, occurred here. Flatly rejecting BD's specious assertions it could unilaterally and secretly change the contractual "mathematical calculation" by which bonus monies "accrued" for the FSReps, and reminding BD it had stipulated it breached its incentive compensation plan, the trial court prior to decertification granted the Class' motion, specifically noted as a matter of law BD had been "skimming the bonus pool for payments to management", and ruled under California law BD

recurring reality today, were this Court not to accept review of this issue, FRCP 23 will be left to be relegated to apply solely to single-state wrongs. It was not drafted to function in such a limited fashion. The definition pressed by BD and others, however, would achieve precisely that result if multi-state FRCP 23 classes could be nullified by the mere assertion that other states' laws differ, even though a different result is not mandated by those states' laws. Such a mere assertion is no substitute for the necessary analysis. Nor can false conflicts be allowed to eliminate FRCP 23's effectiveness. Joint Petitioners submit review by this Court on this issue can prevent that unanticipated and uncalled for erosion of FRCP 23.

III. Due Process Clause Does Not Permit Trial Court to Vacate Rulings Favorable to Litigants On Appeal No Longer Before It

Without describing at this time BD's failure to comply

was guilty of "conversion" here for "skimming" that money from its FSReps residing in a ten-state region. CR 333/RT (6/6/91) at 15.

with the Bates/Ringsby standards it gave mere lip service, Joint Petitioners submit its failure to explain (1) how it was that the "out of court" Dunmeyer intervenors could concededly appeal the intervention issue but no other orders final as to them, or (2) how it could, in settling with Mr. Koepke and his local counsel,[4] proceed to vacate rulings favorable to the former class members' cases who were on appeal, in the absence of those individuals and their attorney, is fatal to its opposition. Vacating rulings and stipulations pertaining solely as to Mr. Koepke was one thing. Vacatur contrary to established precedent and the Due Process Clause of the Fifth Amendment, as it involved "out of court"

[4] BD's disingenuous attempt to implicate petitioners' counsel in the settlement it negotiated solely with former class representative Koepke's local counsel, Bruce L. Shaffer, by virtue of petitioners' counsel (lead Koepke trial counsel) attending the final Pretrial Conference prior to the case ever settling (CR 874), is beneath the dignity of this Court. BD never presented petitioners nor their counsel with any authority for the vacatur of rulings favorable to the petitioners (already "out of court" and on appeal to the 9th Circuit), and never presented them or their counsel with so much as a copy of any motion or proposed vacatur order. (Appendix C-35 - 38). No truthful, ethical statement to the contrary can be made. The record confirming those facts is eminently clear.

individuals on appeal, is quite another. Review by this Court of increasing attempts by repeat litigators to obtain vacatur would prevent degradation of the federal courts.

IV. Disjunctive "Impede" Test Cannot Be Interpreted Out of FRCP 24

BD's efforts to block this Court's review by claiming mootness or citing the Texas Eastern Fifth Circuit "impairment" case that actually endorsed the "impede" factor in Diaz relied upon petitioners, is equally unavailing. This Court has rejected the defense strategy of "picking off" named plaintiffs then claiming mootness. See Deposit Guarantee National Bank v. Roper, 445 U.S. 326, 339-40, 1--S.Ct. 1166, 1174-75 (1980); cf. United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S.Ct. 2464 (1977). Further, BD's irresponsible assertion in opposing review of the FRCP 24(a) "impede"issue that the trial court ruled it lacked jurisdiction to consider FRCP 24(b) issues (when the trial court prior to ruling assumed "I have jurisdiction" - CR 828/RT (4/29/94) at 12) exhibits desperation, not merit.

Review by this Court of the "impede" issue would aid the lower courts by avoiding a bend to duplicitous litigation back toward resolving matters in a single existing case.

CONCLUSION

Joint Petitioners respectfully submit predictable and consistent applications of functional federal rules of appellate and civil procedure are the cornerstones of the federal circuit and district courts. Review by this Court of the important procedural and improper vacatur questions presented further this Court's goals.

Respectfully submitted this 18th day of July, 1996,

James M. Thomas
(Counsel of Record)

Weiss, Jensen, Ellis & Howard
2600 Pike Tower
520 Pike Street
Seattle, WA 98101

Attorneys for Joint Petitioners
Dunmeyer, Furuta, Jackson,
Johnson, Karch, Kentala,
Perret, Procalo, Forster,
Jones, Oravetz, Peckels, White,
Williams, Zucht